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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

05 CR 001192 (NRB)

5 PHILLIP BENNETT,

6 Defendant.

7 -----x

8 New York, N.Y.
9 February 15, 2008
5:40 p.m.

10 Before:

11 HON. NAOMI REICE BUCHWALD,

12 District Judge

13
14 APPEARANCES

15 MICHAEL J. GARCIA

16 United States Attorney for the
Southern District of New York

17 NEIL M. BAROFSKY

CHRISTOPHER L. GARCIA

Assistant United States Attorneys

18 KRAMER LEVIN NAFTALIS & FRANKEL

19 Attorneys for Defendant

20 GARY P. NAFTALIS

21 DAVID S. FRANKEL

ADAM C. FORD

DARREN A. LAVERNE

22 ALSO PRESENT: WILLIAM JOHNSON, Postal Inspector

23 KRIS MOON, Postal Inspector

ANNE RAILTON, Law Student

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1 (In open court)

2 (Case called)

3 THE DEPUTY CLERK: The case is United States against
4 Phillip Bennett; docket number 05 CR 1192. Is the government
5 ready to proceed?

6 MR. BAROFSKY: Yes. Neil Barofsky for the government.
7 With me at counsel table, with your Honor's permission, is
8 Christopher Garcia of our office, our postal inspectors on the
9 case, William Johnson and Kris Moon, as well as our legal
10 intern, Annie Railton, who's been assisting the trial of this
11 matter. Good evening, your Honor.

12 MR. GARCIA: Good evening, your Honor.

13 THE DEPUTY CLERK: Is the defense ready to proceed?

14 MR. NAFTALIS: Yes, we are. Gary Naftalis for
15 Mr. Bennett, along with David Frankel.

16 THE COURT: Mr. Naftalis?

17 MR. NAFTALIS: Your Honor, we have an application on
18 behalf of Mr. Bennett to withdraw his plea of not guilty to the
19 charges in the indictment and to offer to plead guilty to the
20 charges in the indictment.

21 THE COURT: All right. Mr. Bennett, would you stand
22 please. Would you raise your right hand.

23 (Defendant sworn)

24 THE COURT: And would you state your full name for me
25 please.

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1 THE DEFENDANT: Phillip Roger Bennett.

2 THE COURT: And Mr. Bennett, how old are you?

3 THE DEFENDANT: 59, your Honor.

4 THE COURT: Why don't you sit down. Mr. Bennett, what
5 was the highest grade in school that you completed?

6 THE DEFENDANT: University. Grade, twelfth grade, I
7 think it is, your Honor.

8 THE COURT: You have the equivalent of a college
9 degree.

10 THE DEFENDANT: Yes, master of arts.

11 THE COURT: And are you now or have you currently been
12 under the care of a doctor or psychiatrist?

13 THE DEFENDANT: No, your Honor.

14 THE COURT: And have you ever been hospitalized or
15 treated for alcoholism or narcotics addiction?

16 THE DEFENDANT: No, your Honor.

17 THE COURT: Are you under the influence of any drug or
18 alcohol today?

19 THE DEFENDANT: I'm not, no, your Honor.

20 THE COURT: And how are you feeling physically today?

21 THE DEFENDANT: Fine, your Honor. Thank you.

22 THE COURT: Mr. Bennett, have you had the opportunity
23 to review the charges against you and your plea with
24 Mr. Naftalis and Mr. Frankel and perhaps some other lawyers, as
25 well?

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1 THE DEFENDANT: I have, your Honor, yes.

2 THE COURT: And have you been satisfied with the
3 advice and counsel that Messrs. Naftalis and Frankel have given
4 to you?

5 THE DEFENDANT: I have, yes.

6 THE COURT: Are you ready to change your plea at this
7 time?

8 THE DEFENDANT: I am, your Honor.

9 THE COURT: And what is your plea at this time, guilty
10 or not guilty?

11 THE DEFENDANT: It's guilty, your Honor.

12 THE COURT: Mr. Bennett, in order to determine whether
13 your plea is voluntary and made with a full understanding of
14 the charges against you and the consequences of your plea, I
15 will make certain statements to you and I will ask you certain
16 questions. I want you to understand that I need not accept
17 your plea unless I am satisfied that you are, in fact, guilty,
18 and that you fully understand your rights. I'm tempted to ask
19 the government to pick a few favorite charges instead of all of
20 these, but, okay.

21 Mr. Bennett, you've been charged in the 20-count
22 indictment.

23 The first count charges you with a conspiracy to
24 commit securities fraud, wire fraud, bank fraud, and money
25 laundering, and to make false filings to the SEC. This crime

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1 carries a maximum sentence under the law of five years
2 imprisonment, a maximum fine of the greatest of \$250,000 or
3 twice the gross pecuniary gain derived from the offense or
4 twice the gross pecuniary loss to persons other than yourself
5 as a result of the offense, and a \$100 special assessment, and
6 a maximum term of supervised release of three years.

7 Do you understand that those are the charges in Count
8 One of the indictment and the maximum statutory penalties
9 applicable to those charges?

10 THE DEFENDANT: I do, your Honor, yes.

11 THE COURT: Counts Two and Three of the indictment
12 charge you with securities fraud. Each of these counts carries
13 a maximum sentence of 20 years in prison, a maximum fine of
14 \$5,000,000 or twice the gross pecuniary gain derived from the
15 offense or twice the gross pecuniary loss to a person other
16 than yourself as a result of the offense, a \$100 special
17 assessment, and a maximum term of supervised release of three
18 years.

19 Do you understand that those are the charges in Counts
20 Two and Three and the maximum penalties under law for those
21 charges of securities fraud?

22 THE DEFENDANT: I do, your Honor.

23 THE COURT: Count Four charges you with making a false
24 filing with the Securities and Exchange Commission. And this
25 crime carries a maximum statutory penalty of 20 years in

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1 prison, a maximum fine of the greatest of \$5,000,000 or twice
2 the gross monetary gain derived from the offense or twice the
3 gross monetary loss to a person other than yourself as a result
4 of the offense, a \$100 special assessment, and a maximum term
5 of supervised release of three years.

6 Do you understand that those are the charges in Count
7 Four and the maximum penalties applicable to those charges?

8 THE DEFENDANT: I do, your Honor.

9 THE COURT: Counts Five and Six of the indictment
10 charge you with making a false filing with the Securities and
11 Exchange Commission -- excuse me, with the Securities and
12 Exchange Commission. Each of these counts carries a maximum
13 sentence under the law of five years imprisonment, a maximum
14 fine of the greatest of \$250,000 or twice the gross pecuniary
15 gain derived from the offense or twice the gross pecuniary loss
16 to a person other than yourself as a result of the offense, and
17 a \$100 special assessment, and a maximum supervised release
18 term of three years. Do you understand that those are the
19 charges in Counts Five and Six of the indictment and the
20 maximum penalties provided for by law for those crimes?

21 THE DEFENDANT: Yes, I do, your Honor.

22 THE COURT: And Counts Seven through Thirteen of the
23 indictment charge you with wire fraud. Each of these counts
24 carries a maximum possible sentence of 20 years in prison, a
25 maximum fine of the greatest of \$250,000 or twice the gross

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1 pecuniary gain derived from the offense or twice the gross
2 pecuniary loss to a person other than yourself as a result of
3 the offense, a \$100 special assessment, and a maximum term of
4 supervised release of three years.

5 Do you understand that those are the charges in Counts
6 Seven through Thirteen, and the maximum penalties under the
7 statute for those charges?

8 THE DEFENDANT: Yes, I do, your Honor.

9 THE COURT: All right. Count Fourteen charges you
10 with making material misstatements to auditors. And this crime
11 carries a maximum sentence of 20 years imprisonment, a maximum
12 fine of \$5,000,000 or twice the gross pecuniary gain derived
13 from the offense or twice the gross pecuniary loss to a person
14 other than yourself as a result of the offense, a \$100 special
15 assessment, and a maximum term of supervised release of three
16 years.

17 Do you understand that that is the crime charged in
18 Count Fourteen of the indictment, and the maximum penalty
19 provided for by statute for Count Fourteen?

20 THE DEFENDANT: Yes, I do, your Honor.

21 THE COURT: Count Fifteen of the indictment charges
22 you with bank fraud. And this crime carries a maximum sentence
23 of 30 years in prison, a maximum fine of the greatest of
24 \$1,000,000 or twice the gross pecuniary gain derived from the
25 offense or twice the gross pecuniary loss to a person other

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1 than yourself as a result of the offense, a \$100 special
2 assessment, and a maximum term of supervised release of five
3 years.

4 Do you understand that that is the charge in Count
5 Fifteen, and that those are the maximum penalties provided for
6 by law?

7 THE DEFENDANT: Yes, your Honor. Forgive me, yes,
8 your Honor.

9 THE COURT: Counts Sixteen through Twenty charge you
10 with money laundering. Each of these counts carries a maximum
11 possible sentence of ten years imprisonment, a maximum fine of
12 the greatest of \$250,000, twice the gross pecuniary gain
13 derived from the offense or twice the gross pecuniary loss to a
14 person other than yourself as a result of the offense, and a
15 \$100 mandatory special assessment, and a maximum supervised
16 release term of five years.

17 Do you understand that those are the crimes charged in
18 Counts Sixteen through Twenty, and the maximum possible penalty
19 provided by law?

20 THE DEFENDANT: Yes, your Honor.

21 THE COURT: Do you also understand that the Court must
22 impose an order of restitution by law?

23 THE DEFENDANT: Yes, your Honor.

24 THE COURT: And do you understand that you are also
25 subject to mandatory asset forfeiture?

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1 THE DEFENDANT: Yes, your Honor.

2 THE COURT: And do you understand that you have the
3 right to plead not guilty and the right to a trial on the
4 charges against you and, in fact, the right to a jury trial?

5 THE DEFENDANT: Yes, your Honor.

6 THE COURT: At this time, I'd ask the government to
7 recite the elements of the crimes charged.

8 MR. BAROFSKY: Yes, your Honor. For Count One,
9 conspiracy, the government would have to prove the following
10 elements:

11 First, that an agreement or understanding existed to
12 commit the objects charged in the indictment. Second, the
13 defendant knowingly became a member of that agreement or
14 understanding. And third, that one of the conspirators
15 knowingly committed at least one overt act in furtherance of
16 the conspiracy during the life of the conspiracy.

17 With respect to Counts Two and Three, securities
18 fraud, the government would have to prove, first, that Bennett,
19 in connection with the purchase or sale of securities, and for
20 Count Two, that would be the notes described in the indictment,
21 and in Count Three, the common stock of Refco described in the
22 indictment, he did one or more of the following: He either
23 employed a device, scheme, or artifice to defraud or made an
24 untrue statement of a material fact or omitted to state a
25 material fact which made what was said under the circumstances

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1 misleading or engage in an act, practice, or course of business
2 that operated or would operate as a fraud or deceit on a
3 purchaser or seller. Second, that Bennett acted knowingly,
4 willfully, and with intent to defraud. And, third, that he
5 used or caused to be used any means or instruments of
6 transportation or communication in interstate commerce, but he
7 used the mails in furtherance of the fraudulent conduct.

8 With respect to Count Four, which charges false filing
9 under the Exchange Act, the first element the government would
10 have to prove is that Refco was required by the Securities
11 Exchange Act of 1934 to file the 10-K that's described in Count
12 Four. And, second, the defendant knowingly and willfully made
13 or caused to be made a materially false or misleading statement
14 in that document or omitted to state any material fact required
15 to be stated therein or necessary to make the statements
16 therein not misleading.

17 With respect to Counts Five and Six, false filings
18 under the Securities Act, the government would have to prove,
19 again, first, that Refco was required under the Securities Act
20 of 1933 to file the S4, which is described in Count Five, and
21 the S1 registration statement described in Count Six. And,
22 second, that Bennett knowingly and willfully made or caused to
23 be made a materially false or misleading statement in those
24 documents or omitted to state any material fact required to be
25 state therein or necessary to make the statements therein not

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1 misleading.

2 With respect to Counts Seven through Thirteen of wire
3 fraud, the government would have to prove, first, that a scheme
4 to defraud must have existed; that Bennett must have
5 participated in the scheme with intent to defraud; that
6 misrepresentations or omissions must have related to material
7 facts were made in furtherance of the fraud; that the scheme
8 was executed to obtain money or property; and that in the
9 execution of the scheme, Bennett used or caused to be used the
10 interstate wires listed in the indictment. And here for Count
11 Seven is the June 22nd of 2004 email from Robert Trosten; in
12 Count Eight, the August 3, '04 email from Robert Trosten; in
13 Count Nine, the April 6, '05 transmission of the S4 from New
14 York to Virginia; in Count Ten, the July 19th, 2005
15 transmission of 10-K from New York to Virginia; in Count
16 Eleven, the August 5th, 2004 transmission of \$4,000,000 from
17 New York to Illinois; in Count Twelve, the August 5th, 2004
18 transmission of \$40,000,000 from New York to Illinois; and in
19 Count Thirteen, the August 8th, 2005 transmission of the S1
20 registration statement from New York to Virginia.

21 For Count Fourteen, material misstatements to
22 auditors, the government would have to prove, first, that Refco
23 was a public company that was required to submit financial
24 statements to the SEC; second, that Bennett was a
25 director/officer of Refco; third, Bennett knowingly and

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1 willfully made, caused to be made, a materially false or
2 misleading statement or omitted to state a material fact
3 necessary order to make the statements made in light of the
4 circumstances under which such statements were made not
5 misleading to an accountant, and that the statement was made in
6 connection with the audit or examination of the financial
7 statements of Refco required to be made pursuant to the Act.

8 Count Fifteen charges the defendant with bank fraud.
9 And specifically, that on August 5th, 2004, defrauded HSBC.
10 And the government would have to prove, first, there was a
11 scheme to defraud a bank by means of materially false or
12 fraudulent pretenses, representations, or promises; second,
13 that Bennett executed or attempted to execute the scheme with
14 intent to defraud the bank, here, again, HSBC; and third, at
15 the time of the execution of the scheme, HSBC had its deposits
16 insured by the FDIC. And I'll represent to the Court that at
17 the relevant time periods, HSBC's deposits were insured by the
18 FDIC.

19 And finally, Counts Sixteen through Twenty charge the
20 defendant with money laundering. And the government would have
21 to prove, first, that Bennett engaged or attempted to engage in
22 monetary transactions involving criminally derived property of
23 a value greater than \$10,000; second, that the property
24 involved in the monetary transaction was, in fact, derived and
25 specified unlawful activity; third, that Bennett acted

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1 knowingly. And for these purposes, wire fraud, bank fraud, and
2 securities fraud are all specified unlawful activities and
3 would have to prove each of the transactions listed in the
4 indictment in Counts Sixteen through Twenty, basically the wire
5 transactions which are described therein.

6 THE COURT: Mr. Bennett, do you understand that if you
7 pled not guilty and went to trial, that the burden would be on
8 the government to prove each and every element of every crime
9 charged beyond a reasonable doubt in order to convict you of
10 that crime?

11 THE DEFENDANT: I do, your Honor.

12 THE COURT: Do you understand that at a trial you
13 would have the right to be represented by an attorney at all
14 stages of the proceeding and, if necessary, an attorney would
15 be appointed for you?

16 THE DEFENDANT: Yes, I do.

17 THE COURT: And do you understand that at a trial you
18 would have the right to confront and cross-examine witnesses
19 and the right not to be compelled to incriminate yourself?

20 THE DEFENDANT: I do, your Honor.

21 THE COURT: And do you understand that at a trial you
22 would be presumed innocent until such time, if ever, the
23 government established your guilt by competent evidence to the
24 satisfaction of the trier of fact beyond a reasonable doubt?

25 THE DEFENDANT: Yes, your Honor.

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1 THE COURT: And do you understand that at a trial you
2 would have the right to testify and would also be entitled to
3 compulsory process; in other words, the right to call other
4 witnesses on your behalf?

5 THE DEFENDANT: Yes, your Honor.

6 THE COURT: And do you understand that if your plea is
7 accepted, that there will be no further trial of any kind, so
8 that by pleading guilty, you are waiving your right to a trial?

9 THE DEFENDANT: I do understand that, your Honor, yes.

10 THE COURT: And do you understand that if you are
11 sentenced to a period of supervised release, and if you violate
12 the terms of your supervised release, that an additional period
13 of jail time may be imposed without credit for the time that
14 you've previously spent on supervised release?

15 THE DEFENDANT: Yes, your Honor.

16 THE COURT: Do you understand that in connection with
17 your plea of guilty, that the Court may ask you certain
18 questions about the offense to which you have pled; and if you
19 answer those questions under oath and on the record and in the
20 presence of your counsel, that your answers are false may later
21 be used against you in a prosecution against you for perjury or
22 false statement?

23 THE DEFENDANT: Yes, your Honor.

24 THE COURT: And I recall, Mr. Bennett, you're a
25 citizen of Great Britain.

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1 THE DEFENDANT: I am, your Honor, yes.

2 THE COURT: Do you understand that following any
3 sentence that you receive, that you will likely be deported?

4 THE DEFENDANT: That is my understanding, your Honor,
5 yes.

6 THE COURT: And do you understand that in determining
7 your sentence, that the Court is obligated to calculate the
8 applicable sentencing guidelines range, and to consider that
9 range and any possible departures under the guidelines and
10 other sentencing factors under the statute which entitles the
11 Court to consider the nature and circumstances of the offense
12 and the history and characteristics of the defendant?

13 THE DEFENDANT: Yes, your Honor.

14 THE COURT: And have you reviewed with your counsel
15 the government's letter to them of yesterday which explains the
16 government's position as to the sentence that you face if the
17 sentencing guidelines are applied to your case?

18 THE DEFENDANT: I have reviewed it, your Honor,
19 correct.

20 THE COURT: Actually, that was said very badly. Let
21 me just try it again so that there's no confusion.

22 Have you reviewed that letter with your lawyers which
23 sets forth the government's calculation of the sentence that
24 you face under the sentencing guidelines?

25 THE DEFENDANT: I have reviewed it.

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1 THE COURT: And do you understand that the government
2 calculates that under the guidelines, that you face a sentence
3 of life imprisonment; and that it has calculated that the
4 maximum possible statutory sentence is 315 years; and that the
5 fine range is from 25,000 to \$5,000,000?

6 THE DEFENDANT: I understand that, your Honor,
7 correct.

8 THE COURT: And do you understand that that
9 calculation by the guidelines -- that by the government is just
10 based on the information they currently have?

11 THE DEFENDANT: Yes, your Honor.

12 THE COURT: And do you further understand that the
13 government's letter doesn't bind either the Court or the
14 probation department, and that ultimately the sentence that you
15 receive will be determined by the Court?

16 THE DEFENDANT: Yes, your Honor.

17 THE COURT: Mr. Bennett, have any threats or promises
18 been made to you to make you plead guilty?

19 THE DEFENDANT: No, your Honor.

20 THE COURT: Have any understandings or promises been
21 made to you concerning the sentence that you will receive?

22 THE DEFENDANT: None.

23 THE COURT: Is your plea voluntary?

24 THE DEFENDANT: It is, your Honor.

25 THE COURT: Mr. Bennett, did you commit the crimes

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1 that you've been charged with in the indictment?

2 THE DEFENDANT: I did, your Honor.

3 THE COURT: Would you tell me in your own words what
4 you did?

5 THE DEFENDANT: Your Honor, during the period that I
6 served as CEO of Refco, I agreed with other Refco executives to
7 enter into a series of transactions at the end of Refco's
8 financial reporting periods to make it appear as if a
9 receivable due to Refco from Refco Upholdings, Inc., a related
10 party, was instead due from an independent third-party
11 customer.

12 The IGHI receivable was composed of, amongst other
13 things, historical customer losses, bad debts, and expenses
14 that IGHI had incurred on behalf of Refco.

15 I, along with other Refco executives, have caused
16 Refco to enter into these transactions in order to conceal the
17 size and nature of the IGHI receivable. We concealed the
18 receivable from, amongst others, Refco's auditors, Thomas H.
19 Lee Partners, various lenders who, in 2004, participated in
20 Refco's senior secured credit facility, and the issuance of 9
21 percent senior subordinated notes, and also investors in
22 Refco's common stock.

23 Among the lenders to whom I knowingly caused the IGHI
24 receivable to be misrepresented was HSBC Bank, referenced in
25 Count Fifteen of the indictment. I and other Refco executives

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1 also used the interstate wires to accomplish these acts within
2 this district, as referenced in Counts Seven through Thirteen.
3 Furthermore, I caused funds obtained from the transaction with
4 Thomas H. Lee Partners, referenced in paragraph 34 of the
5 indictment, to be wired to various parties receiving proceeds
6 from the transaction, as referenced in Counts Sixteen through
7 Twenty, knowing that this money had been unlawfully obtained.

8 The IGHI receivable and related party transaction used
9 to conceal it were material information that Refco investors
10 and lenders would have wanted to have known prior to investing
11 in or lending money to Refco. While I believed that I would be
12 able to pay the IGHI receivable down over time, and did, in
13 fact, ultimately pay off the receivable balance in its
14 entirety, I knew that failing to disclose the receivable was
15 wrong; I knew that obtaining funds from Refco's investors and
16 lenders based on misleading financial statements was also
17 wrong.

18 I also caused Refco to file documents with the SEC,
19 namely S1, S4, and 10-K that did not disclose the full extent
20 of the IGHI receivable or the transactions used to conceal it;
21 and, thus, were false and misleading with respect to material
22 facts. I knew that failing to disclose these facts in public
23 filings and in connection with Refco's sale and registration of
24 Refco's notes and common stock was wrong, and I deeply regret
25 having done so.

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1 Your Honor, I take full responsibility for my actions.
2 I wish to publicly apologize to my family and to all of those
3 who have been harmed by my conduct. Thank you, your Honor.

4 THE COURT: Mr. Barofsky, is there anything else you
5 would want me to ask the defendant?

6 MR. BAROFSKY: Your Honor, can we just have a moment
7 to review? There's a lot of elements. Thank you, your Honor.

8 THE COURT: Certainly.

9 (Pause)

10 MR. BAROFSKY: Your Honor, just a couple of areas for
11 clarification. First, if you can please ask the defendant to
12 confirm that he was a director or officer of Refco during this
13 relevant time period. Should I go one-by-one?

14 THE COURT: Mr. Bennett, can you confirm that?

15 THE DEFENDANT: I was, your Honor.

16 MR. BAROFSKY: Second, your Honor, that the
17 misstatements made about Refco's auditor was in connection with
18 the auditor's preparation of a financial statement, and that
19 occurred after April of 2005.

20 THE COURT: Can you confirm that?

21 THE DEFENDANT: That's correct, your Honor.

22 MR. BAROFSKY: Your Honor, and if you can ask the
23 defendant to confirm he made reference to various wire
24 transfers and wire communications, as well as certain filings
25 in the indictment, if you could please confirm with the

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1 defendant that those acts occurred on or about the dates set
2 forth in the indictment.

3 THE DEFENDANT: They did, your Honor.

4 MR. BAROFSKY: And finally, your Honor, as I noted
5 earlier, I will represent to the Court that HSBC was --
6 deposits were insured by the FDIC during the relevant time
7 period; and also that Refco was an entity that was required to
8 file the various reports and documents and registration
9 statements under the Exchange Acts of 1933 and 1934, as well as
10 to file financial statements with respect to the 10-K and the
11 misstatement to auditors account. Thank you, your Honor.

12 THE COURT: Mr. Bennett, do you still wish to plead
13 guilty?

14 THE DEFENDANT: I do, your Honor, yes.

15 THE COURT: Mr. Naftalis, do you know of any reason
16 that Mr. Bennett ought not plead guilty?

17 MR. NAFTALIS: No, your Honor.

18 THE COURT: Mr. Bennett, I'm satisfied that you
19 understand the nature of the charge against you and the
20 consequences of your plea; and that your plea is made
21 voluntarily and knowingly; and that there is a factual basis
22 for it. Accordingly, I will accept your plea of guilty and
23 direct that a presentence report be prepared.

24 THE DEFENDANT: Thank you, your Honor.

25 THE COURT: As for a sentencing date, can I just

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1 basically count out the requisite number of days or does the
2 government have a view that it should be maybe a little bit
3 more off into the future in light of the trial that's still
4 upcoming?

5 MR. BAROFSKY: Your Honor, we think we can be prepared
6 in three months.

7 THE COURT: All right. Why don't we set sentencing
8 for May 20th at 4 o'clock. And since I would anticipate some
9 significant presentence submissions, I think we should set a
10 schedule for that. Why don't we say that the government's
11 submission is due -- the defense submission is due on May 6th,
12 and the government's on May 13th.

13 MR. BAROFSKY: That's fine, your Honor.

14 MR. NAFTALIS: Your Honor, if there are things in the
15 government submission that we want to respond to, that's sort
16 of --

17 THE COURT: Doesn't give you quite enough time.

18 MR. NAFTALIS: We don't have -- you're having us
19 first, so we don't really sort of provide -- they could go
20 first, we could go second; we wouldn't object to that.

21 MR. BAROFSKY: We could do simultaneous submissions,
22 as well, your Honor, on the 6th and then we could each respond.

23 THE COURT: Sounds like fun.

24 MR. BAROFSKY: Okay.

25 MR. NAFTALIS: It's a living.

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1 THE COURT: Let's not go there. Okay? Are we done?

2 MR. BAROFSKY: No, your Honor. There is the issue of
3 bail. And at this time, your Honor, the government does
4 request that defendant be remanded. And if your Honor will let
5 me, I would like to speak briefly on the topic.

6 THE COURT: Okay.

7 MR. BAROFSKY: Obviously the standard has changed
8 under the Bail Act under 3143. Before when we appeared before
9 your Honor several years ago, the burden was ours to prove the
10 defendant was a risk of flight. Now, of course, it is the
11 defendant's burden to prove by clear and convincing evidence
12 that he is not likely to flee. And respectfully, we submit
13 that there have been some extremely significant changed
14 circumstances, that we respectfully submit the defendant cannot
15 meet the burden in this case.

16 First of all, under the current bond, which, as your
17 Honor may recall, is a \$50,000,000 bond, secured by \$5,000,000
18 in cash and two properties, that security is now essentially
19 worthless; it's essentially an unsecured bond, because all of
20 those properties and that money are subject to asset
21 forfeiture. The \$5,000,000 we have traced as direct proceeds
22 from the IPO, which the defendant has just admitted was money
23 that was fraudulently obtained, and we already have lis pendens
24 on both of the properties, because basically under substitute
25 assets, we'd be able to take those, as well. Those are all

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1 subject to asset forfeiture and, therefore, don't provide any
2 security for the existing bond.

3 Secondly, the defendant is facing a \$2.4 billion asset
4 forfeiture. We don't think he has \$2.4 billion, but we do
5 believe that will essentially -- through proceeds and
6 substitute assets, once this conviction is final -- will
7 basically deprive the defendant of all of his assets. We have
8 restrained a number of his assets pretrial, but we have not
9 been able to restrain assets that we haven't been able to prove
10 are directly traceable. And we don't know the exact amount of
11 those items, but we believe that they are in the \$20,000,000
12 range, which would certainly facilitate the ability of the
13 defendant to flee.

14 Third, and I guess the most obvious point, is the
15 defendant now faces an advisory guideline range of 315 years of
16 imprisonment. And that obviously changes the calculus a lot
17 from when we last appeared before your Honor. We're not
18 suggesting that your Honor is going to --

19 THE COURT: He always faced that, right?

20 MR. BAROFSKY: Yes, your Honor; but before,
21 pretrial -- I'm sorry, pre-guilty plea, there was no certainty
22 that he was necessarily going to be convicted in this case.
23 Now, jail is an inevitability. And I don't mean to presume
24 what the ultimate sentence will be in this case, because
25 there's obviously no way to predict what the precise sentence

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1 will be, but the best guess, I think, from anyone's
2 perspective, is that it will be a substantial prison sentence.
3 And for this defendant -- he is now with certainty facing such
4 a sentence that has -- under the guidelines is the equivalent
5 of a life sentence.

6 Defendant is 59 years old. A sentence of -- a
7 significant sentence in this case may very well prove to be the
8 equivalent of a life sentence. The defendant is facing certain
9 deportation after he serves that sentence.

10 THE COURT: Not to a bad place though.

11 MR. BAROFSKY: Not to a bad place, your Honor. But it
12 does give the defendant a tremendous incentive to self-deport.
13 In other words, to flee the jurisdiction really with -- unlike
14 most cases, with very little downside. The worse that happens
15 if he flees and gets caught is he's brought back to the United
16 States and does a jail sentence that probably will be the rest
17 of his life. If he stays, he's facing pretty much the prospect
18 of the same result, a sentence that may, in fact, result in him
19 being in jail for the rest of his life, given his age.

20 And, your Honor, we respectfully submit that given the
21 shifting of the burden in these really remarkable circumstances
22 of a defendant who's not a U.S. citizen, who's facing the
23 equivalent of a life sentence, and who's now basically would be
24 free on an unsecured bond, that the circumstances dictate the
25 defendant should start serving his sentence, in effect,

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1 immediately. And the defendant should be remanded on the
2 grounds that he cannot meet his burden of demonstrating by
3 clear and convincing evidence that he is not a risk of flight.

4 THE COURT: Mr. Naftalis.

5 MR. NAFTALIS: Most respectfully, I find this
6 application most surprising and a baseless one. And I say it
7 with -- most advisedly.

8 You have a situation here where our client, for almost
9 two and-a-half years, has met every single condition of the
10 bond that was set here. Your Honor got a report today from the
11 office of pretrial services, which we were given a copy of when
12 we entered the room, in which the office of pretrial services
13 has pointed out that he has complied with the terms of his bail
14 all the way through.

15 And I can sort of punctuate that a little bit because,
16 in fact, if you check with Officer Forelli, who he deals with
17 in pretrial services, you could hear anecdotal information such
18 as Mr. Bennett was the one who has set up the monitoring system
19 in the house in New Jersey because, whatever, I guess they're
20 technophobes, like I, the marshals service, he actually set up
21 the monitoring service which passed their muster in the
22 electronic stuff. Once, when his bracelet broke down, he
23 immediately reported it to Officer Forelli that it was
24 malfunctioning and he went in. He's been meticulous in
25 reporting to these people.

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1 And secondly, something that the government
2 consciously avoided bringing to your attention, his bond is
3 signed by the three immediate members of his family. The three
4 of them who are American citizens: His wife, his daughter, and
5 his son. They have signed a \$50,000,000 bond on his behalf,
6 and these are people with roots in the community. The daughter
7 is a lawyer, works at a law firm; the son is an investment
8 banker with a leading firm. The notion that he would run away
9 and do that to his family, I mean, is incomprehensible. And
10 all we have is rhetoric from the government there.

11 You also have the strict monitoring conditions in
12 which he's under and which he's faithfully complied with for
13 the last two and-a-half years. Of course, he has no passport;
14 his wife has given up his passport; he has no effective way of
15 leaving the country.

16 And with respect to other situations, in other
17 situations in high-profile cases where people were facing
18 enormous sentences, no such applications were ever granted.
19 For example, the *Computer Associates* case, where the CEO of
20 Computer Associates, Mr. Kumar, who, under the guidelines which
21 were then in effect, more applicable now, after the *Gall* case,
22 the guidelines are just, you know, one ingredient in the soup
23 for your Honor to consider under 3533. He faced life
24 imprisonment under his guidelines. After pleading guilty, he
25 continued to be free on bond, even though there were admissions

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1 of obstruction of justice in that case.

2 After Kumar was sentenced or he got a 12-year
3 sentence, he continued to be allowed to be -- remained free on
4 bond to work out various issues of restitution and the like.

5 In the case in front of Judge Sand, the *Adelphia* case,
6 which is one of the cases, the Rigases, who got 15 and 20-year
7 sentences, one of them was an eighty -- somewhere in his
8 eighties, they were allowed to remain free on bond pending
9 appeal, even though they had the same sort of issues. Even
10 Mr. Ebbers, who received the largest sentence in history I've
11 ever heard of, a real outlier sentence, 25 years, he was
12 allowed to remain free on bond pending appeal and the like.

13 And apart from the fact that there is not the
14 slightest bit of evidence for this most unfair application,
15 it's also prejudicial. As your Honor knows, we have to put in
16 sentencing submissions. And under 3533, your Honor has a lot
17 of things which you can properly consider in determining in
18 your best judgment what's a fair and just sentence under the
19 case here. And obviously it's very prejudicial to us in being
20 able to work with our client, who for the last two and-a-half
21 years has been coming to our office every day on a daily basis
22 to work on the case with us. So I don't see any good-faith
23 basis for any change in bond here whatsoever.

24 THE COURT: Mr. Barofsky.

25 MR. BAROFSKY: Your Honor, if there's any specific

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1 points you'd like me to respond to. The ones that jump out to
2 me is, I mean the notion that a defendant can't chronically
3 prepare for sentencing when he's incarcerated, obviously your
4 Honor knows countless defendants who are able to prepare for
5 sentencing when they are incarcerated; and having spent so much
6 time with Mr. Naftalis, I think they are pretty much -- I'm
7 sure they have contemplated this before, this is not the first
8 time.

9 As opposed to those other cases, defendants who are
10 released pending appeal after they've been convicted at trial
11 is a different situation. There's obviously provisions within
12 3143 when there are issues on appeal that the judge finds are
13 significant issues that need to be considered and possibly
14 could result in the reversal of a conviction. That's a
15 different -- those are different facts, and that's a different
16 standard. Here, we have a guilty plea. I don't think that
17 Mr. Bennett is going to be challenging his conviction in this
18 case. He just gave a very detailed guilty plea.

19 With respect to his assurances to his family, I don't
20 mean to minimize the bond between Mr. Bennett and his family,
21 but on the flip side, we're looking at a man who just admitted
22 to telling a series of lies to a large number of victims that
23 resulted in the defrauding of \$2.4 billion. 1.7 or 8 billion,
24 which we will show for restitution at the time of sentencing,
25 has not been collected. People are out all of this money.

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1 So this man maybe may have some allegiance to his
2 family, but I think you have to look at the flip side as to how
3 strong that may be by a man if he is willing to tell whatever
4 lie is necessary to -- you know, on proportions that are
5 mind-boggling, in the billions of dollars.

6 So we would respectfully submit that -- and we don't
7 contest the fact, by the way, to be clear, that Mr. Bennett has
8 complied with the conditions. And that is certainly a relevant
9 factor that Mr. Naftalis points out and we don't contest it.
10 We just don't think that that's enough to meet his burden,
11 given his changed circumstances. And that to allow a defendant
12 like this, who's also not a U.S. citizen, unlike those
13 individuals, out on what is essentially an unsecured bond, it
14 simply isn't the right course of action here.

15 MR. NAFTALIS: Just one small point, which they
16 reminded me to mention. Although Mr. Bennett never changed his
17 citizenship, like his wife, or became an American citizen like
18 his children, he's lived in the United States for more than 30
19 years; so it's not like he has any roots anyplace else. So
20 it's a little unfair for this eleventh-hour application which
21 we heard about today to suggest as if he had someplace to go
22 to.

23 And the government ignored the situation in the *Kumar*
24 case. He said that all these other cases where people were on
25 appeal. In the *Kumar* case it was a plea of guilty with someone

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1 facing, if one took the government's view of the thing, a life
2 sentence. And he was allowed out, and he showed up. Even
3 after he got his sentence of 12 years he remained out on bond
4 to work out the restitution things.

5 And we don't necessarily agree at all with the amount
6 of the forfeiture issues here. I mean there's a forfeiture
7 issue in the case, but the numbers he tosses around are not
8 numbers that we have stipulated to or agreed to by any stretch
9 of the imagination, and he throws them around.

10 That's the only point I wanted to make.

11 THE COURT: All right. I'm not going to remand
12 Mr. Bennett, although I do think I can modify his bail
13 conditions to create greater security. And I'm not going to do
14 so for a number of reasons, the most important of which is that
15 this indictment was filed in 2005.

16 If Mr. Bennett had wanted to flee, he should have fled
17 before he paid his lawyers all the money, and kept it, and gone
18 to an appealing location. In fact, having pled guilty, to
19 leave now, extraditing him will be much easier. So there's a
20 balance there.

21 In addition, I note that just by statute, to release
22 someone on appeal requires the same finding as the finding now.
23 The judicial officer has to be persuaded by clear and
24 convincing evidence that the person is not likely to flee.
25 That's half of the standard. The appellate issue is the other

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1 half, so it's the same standard.

2 And I also think that -- and I want to make it
3 clear -- that I don't make any prejudgments about the substance
4 of the case, but this is a case in which there has been a lot
5 of information, publicly, at least, from the bankruptcy
6 proceeding, and so this is a situation in which Mr. Bennett has
7 had the opportunity to see an examiner put the evidence
8 together. This is not a situation where as the case approaches
9 trial, the government finally turns over information. I think
10 Mr. Bennett has had a pretty good idea of the nature of the
11 case and the evidence for at least some time, which makes the
12 fact that he stays more significant.

13 The pretrial officer tells me that it would be easier
14 and more effective to monitor Mr. Bennett if he stayed in one
15 home or the other. And, I guess -- and tells me that basically
16 the minute he leaves home they know about it. So given that it
17 would take some time to -- since make an escape without a
18 passport, I think that if we modified the bail conditions to
19 limit his location, pretrial tells me that that makes it a more
20 secure situation. In addition, if the government has any
21 particular practical economic conditions that you can think of,
22 I'm always willing to listen to those.

23 MR. BAROFSKY: Your Honor, the posting of additional
24 assets by the defendant, they are largely forfeitable assets,
25 but to the extent that there are assets that have not been --

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1 as I said, we estimate that it's in the range of approximately
2 \$20,000,000. If we could at least secure those assets, these
3 are assets that we've not yet secured by having him posted for
4 the bond.

5 In addition, because, frankly, we're going to get
6 those assets anyhow at the conclusion of this case, perhaps the
7 posting the requiring of assets from the children. He
8 mentioned that the children are successful, one's an investment
9 banker. And if they have property, that may increase the
10 incentive for Mr. Bennett to stay.

11 THE COURT: I think it's enough that he's -- the bond
12 mortgages their future if he flees. We're not taking his kids'
13 money.

14 MR. BAROFSKY: We aren't. I wouldn't suggest that we
15 would take it other than if he fled. We would only be posting
16 whatever interest. Because really right now the problem, your
17 Honor, and I hear what your Honor is saying, is that he has an
18 unsecured bond, and that just causes us a great deal of
19 concern. I don't know what the circumstances are in *Kumar* or
20 *Ebbers*, but this is a situation if there is a third party
21 posting collateral --

22 THE COURT: For all those people, the bottom line is
23 that for any defendant who was older and who was facing
24 sentencing, in, lets call it, the post-Enron era, the situation
25 was the same as for Mr. Bennett. The possibility that their

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1 sentence would be -- that their residence in the Bureau of
2 Prisons was the last residence they are going to have.

3 So I don't think this is really dramatically
4 different. And I don't think the fact that he's a British
5 citizen changes the situation, that he has to -- I think he
6 gets the credit for having complied with all of his bail
7 conditions and having had two and-a-half years to reflect.

8 MR. BAROFSKY: Your Honor, to be clear, I wasn't
9 rearguing the bail application. I was merely trying to respond
10 to your Honor's question whether there were additional economic
11 circumstances.

12 THE COURT: I'm not asking his children, okay?

13 MR. BAROFSKY: Well, your Honor, then I would ask that
14 in the alternative, if the defendant could post additional
15 property or money that has not been seized or frozen by the
16 government to secure this bond to at least increase so that
17 there's some notional security of the bond. And I would ask
18 for a number of \$10,000,000 in cash or property.

19 MR. NAFTALIS: Your Honor, I just think there is no
20 basis whatsoever for the application. His children, the most
21 important things in the world, are on the hook for \$50,000,000
22 if he were to leave. As they've indicated, they don't have any
23 evidence of anything that he's ever done anything which would
24 indicate he would leave. As your Honor said, quite correctly,
25 we've known about the evidence in this case; your Honor

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1 remembers the litigation with respect to the bankruptcy trusts,
2 these report the motion practice there. There's no secret
3 about that. He's showed up all the time; he's complied with
4 all the conditions. And there's not a reason in the world and
5 there's not a basis in the world for any change here
6 whatsoever.

7 MR. BAROFSKY: Your Honor, respectfully, I don't see
8 any harm in having him post additional property that could only
9 be used at this time for the purposes to facilitate flight. He
10 can't transfer these properties without violating the money
11 laundering laws at this point, and I don't see -- I don't even
12 understand how upping the collateral so as to prevent him from
13 fleeing prejudices him in any way. And we're not asking even
14 for all of the money that we believe is out there, we're asking
15 for \$10,000,000 to provide some additional security on what is
16 now an essentially an uncollateralized bond. It doesn't really
17 move the ball tremendously for us, but it helps. And at least
18 it would limit his ability to flee, should he make that
19 decision, that it makes more sense to self-deport, since he's
20 going to be going back to England anyhow before he has to face
21 the sentence. I don't think the government's request is
22 shocking or surprising or terribly dramatic, but we do think it
23 would help, given the situation.

24 MR. NAFTALIS: They have not shown anything for this
25 eleventh-hour request. It's totally and absolutely baseless.

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1 And I don't think -- I don't know what property may or may not
2 exist, but I don't think that there's any justification. And
3 they just can't come into court without any basis whatsoever
4 and allege things where all the evidence shows that this
5 application is frivolous.

6 MR. BAROFSKY: Your Honor, I've listened to this for a
7 fair amount of time now. And to characterize our application
8 as frivolous and baseless and eleventh-hour I think is unfair.

9 THE COURT: At least the eleventh hour.

10 MR. BAROFSKY: I don't know when we were supposed to
11 have made this application. I don't know if Mr. Naftalis would
12 have had us make it when he notified us about the intent to
13 change his plea yesterday afternoon, I don't think so. I think
14 the only time we can make a plea based on the changed
15 circumstance of the defendant entering a guilty plea is after
16 he enters the guilty plea.

17 As far as it being baseless, the notion that a
18 defendant who's facing 315 years of prison time --

19 THE COURT: He wishes.

20 MR. BAROFSKY: -- is -- that it's baseless to seek his
21 remand when he is an English citizen subject to deportation --

22 THE COURT: Excuse me. We're not -- we're sending him
23 to one of the most civilized countries in the world. It's not
24 punishment to live in England, all right?

25 MR. BAROFSKY: Exactly, your Honor, which is why we

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1 would ask for additional collateral.

2 THE COURT: And there is an extradition treaty between
3 the United States and Great Britain, so...

4 MR. BAROFSKY: Your Honor, I just don't understand the
5 harm --

6 THE COURT: Because I'm not sure that the purpose of
7 bail is to help you collect, you know, whatever you claim is
8 your eventual restitution.

9 MR. BAROFSKY: Your Honor, if I wasn't clear on this
10 argument, I apologize. The reason why we're asking for this is
11 to assure the defendant's appearance. If that money is posted
12 as a bond, it's not so that we can eventually seize it. If
13 it's posted as a bond, it's not available for him to use to
14 facilitate flight. It's also to secure the bond. This
15 original bond was issued because it was secured by money and
16 property. Right now it's essentially not secured by money and
17 property.

18 THE COURT: But that argument applies to any
19 additional money that he would put up. You would say it was
20 just as forfeitable to you. So it then becomes unsecured, the
21 same way.

22 MR. BAROFSKY: But it's unrestrained property, Judge,
23 that's the difference. This property is actually restrained on
24 top of the fact that it's -- because it's their direct
25 proceeds.

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1 What I'm suggesting, these are other properties that
2 have not been restrained, because we're not able to restrain
3 certain properties that are not proceeds. So this is money
4 that is available to the defendant for use if he wants to
5 facilitate flight.

6 The purpose of a bond, obviously security of a bond,
7 and why your Honor endorsed the order of a secured bond, was
8 because more security means less likelihood of flight. And all
9 we're suggesting is taking this property that is now available
10 to the defendant and posting it as security for the bond. And
11 obviously if we are unable to prove, as Mr. Naftalis suggests,
12 that this is property that's subject to asset forfeiture or
13 restitution, he'll get it back when -- at the time of his
14 sentencing or the time that he reports.

15 So we're not taking anything; we're not putting our
16 hands on stuff that we're not entitled to; we're just asking
17 that this bond be really secured, because right now we're
18 basically -- it's the exact same situation we had in October of
19 2005, when he's going out on the same conditions, it's
20 essentially an unsecured bond. And I don't think that your
21 Honor would have ordered an unsecured bond back then, and we're
22 just asking for some additional security: Money that is
23 available for the defendant or property, and that we have that
24 to secure the bond in case the defendant flees, and to
25 encourage him not to flee.

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1 MR. NAFTALIS: Apart from the fact that the government
2 has proffered not a single fact that anything has changed, I
3 don't agree with the notion that this bond is unsecured. One
4 of the homes which is securing the bond -- there's \$5,000,000
5 cash, there's two residences, is in a trust. So without going
6 through all the legalities, I don't think it's so quickly
7 forfeitable, as they say.

8 And the notion of ignoring -- and that will be worked
9 out; we're not here to litigate that issue, but I just -- and
10 the notion that they can continue to ignore the fact that his
11 wife and children have signed a \$50,000,000 bond that they will
12 be on the hook for and their lives will be ruined, the notion
13 there's not the slightest reason to suppose that he would do
14 this to his children, he never has, and I have nothing else to
15 say.

16 THE COURT: I think \$50,000,000 is a lot of money.
17 And it does directly affect wife, children, inheritances. So
18 what about the issue of where he's going to live?

19 MR. NAFTALIS: If your Honor wants -- feels it would
20 be better, pretrial services --

21 THE COURT: That's what pretrial tells me.

22 MR. NAFTALIS: I think he would -- there's a residence
23 in New York and a residence in New Jersey. I think he would
24 prefer to be in New Jersey where his wife is, and then subject
25 to the fact he could just come to our offices and work with us,

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1 which I think he's allowed to do, I think that would be his
2 preference in terms of the quality of the life until the
3 sentence, if that's --

4 THE COURT: I get the high sign from pretrial; so
5 he'll stay in New Jersey.

6 MR. NAFTALIS: Okay.

7 THE COURT: Other than when he goes to you and also
8 when you have to get him to pretrial for -- to probation for
9 his interview.

10 MR. NAFTALIS: Yes.

11 THE COURT: Which we do need to do within the two
12 weeks so that the sentencing schedule can proceed. And the
13 same is true for the government's description of the crimes.

14 Okay? I think we're done then.

15 MR. NAFTALIS: Thank you, your Honor.

16 MR. BAROFSKY: Thank you, your Honor.

17 MR. GARCIA: Thank you, your Honor.

18 THE DEFENDANT: Thank you, your Honor.

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